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03-1145

No. 03-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LYLE D. McMULLEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES BYRON HOLCOMB
Attorney for Petitioner
P.O. Box 10069
Bainbridge Island, WA 98110
(206) 842-8429

185405

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether admitted judicial misconduct by the hearing Judge in the form of violation of the Judge's oath of office as set forth in 28 U.S.C. § 453, after complaint by Petitioner but not withdrawing his Opinion, or recusing himself, or reassigning the matter, or for rehearing as moved for, is grounds for per se reversal of the Judge's decision on the basis of violation of that oath as prima facie bias and prejudice under 28 U.S.C. § 455(b)(1), or both statutes separately, and requires an order by the United States Court of Appeals for the Federal Circuit for reassignment and rehearing before a different Judge, as petitioned for but not acted on by said Court?

Whether the Secretary of the Army reached an administrative settlement of the Petitioner's claim for reinstatement to active duty by ordering Petitioner back to active duty during pendency of decision before the United States Court of Appeals for the Federal Circuit without notice or approval from the Court and relief afforded under the jurisdiction of the United States Court of Claims, when that Court had before it review of the decision of the Army Board for Correction of Military Records which denied Petitioner's eligibility for reinstatement to active duty, thereby binding all officers of the United States Army under 10 U.S.C. § 1552, as moved before that Court for summary reversal by Petitioner but not acted on by that Court?

Whether the concept of "justiciability" has any application in the United States Court of Federal Claims when the Court sits in review of a decision of a military correction board under that board's subject matter jurisdiction conferred by Congress "to correct error or remove an injustice"?

PARTIES TO THE PROCEEDING

Petitioner is Lyle D. McMullen (hereinafter "McMullen") whose status is as an Army National Guard and Army Reserve Commissioned Warrant Officer (CW-4), presently serving under involuntary orders on active duty in the United States Army in Iraq since January 16, 2003, and who was on active duty in the United States Army as an Active Guard Reserve ("AGR") Officer at the same rank when involuntarily released from active duty to the active Reserves on April 1, 1999.

Respondent United States of America is the proper party Respondent under United States Court of Federal Claims jurisdiction.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Circuit opinion (App. A) is unreported. The Circuit opinion on rehearing (App. E) is also unreported. The Circuit motions panel decisions are unreported. The United States Court of Federal Claims opinion (App. B) is reported in 50 Fed. Cl. 718 (2001) as amended by and Order of the Judge and Errata (App. C).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on October 31, 2003. The Court of Appeals entered an order denying petition for recall of the mandate and for rehearing on November 12, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, CIVIL RULE, AND REGULATORY PROVISIONS INVOLVED

Constitution:

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law.."

Statutes:

10 U.S.C. § 101 entitled "Definitions":

> (d) Duty status—The following definitions relating to duty status apply in this title:
>
> (1) The term "active duty" means full-time duty in the active military service of the United

> States . . . Such term does not include full-time National Guard duty.
>
> (5) The term "full-time National Guard duty" means training or other duty . . . performed by a member . . . under section 316, 502, 503, 504, 505, of title 32 . . .

10 U.S.C. § 815 entitled: "Art. 15. Commanding Officer's non-judicial punishment" provides in pertinent part:

> (a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of court-martial to which the case may be referred upon such demand . . .

10 U.S.C. § 1293n, entitled: "Twenty years or more: warrant officers" provides in pertinent part at note (as to Army):

> n. (b)(1) During the active force drawdown period, the Secretary of the Army may—
>
> (A) apply the provision of section 3911 of such title [section 3911 of this title], to a regular or reserve commissioned officer with at least 15 but less than 20 years of service . . .
>
> (c) The Secretary of each military department may prescribe regulations and policies regarding the criteria for eligibility for early retirement by reason

> of eligibility pursuant to this section and for approval for applications for such retirement. Such criteria may include factors such as grade, years of service, and skills.

10 U.S.C. § 1552 provides in pertinent part:

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice . . . acting through boards of civilians of the executive part of that military department.
>
> (a)(4) Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

10 U.S.C. § 12313(a) provides:

> Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

10 U.S.C. § 12731a(c) provides:

> (1) The Secretary concerned may limit the applicability of subsection (a) to any category of personnel defined by the Secretary in order to meet a need of the armed force under the jurisdiction of the Secretary to reduce the number of members in certain grades, the number of members who have completed a certain number of years of service, or the number of members who possess certain military skills or are serving in designated competitive categories.[1]

---

1. No regulation was adopted at the time of McMullen's claim for TERA. For clarity purposes the proper statute for TERA claims for a (Cont'd)

28 U.S.C. § 372 provides in pertinent part:

> (c)(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may —
>
> (A) dismiss the complaint if he finds it to be
>
> (ii) directly related to the merits of a decision or procedural ruling...

28 U.S.C. § 453 provides:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, _____ _____ do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and the rich, and I will faithfully perform and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God."

28 U.S.C. § 455 provides in pertinent part:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party . . .

(Cont'd)
Reserve officer on active duty is 10 U.S.C. § 12731a as part of the Reserve Personnel Management Act. 10 U.S.C. § 1293n applies under the provision for Regular warrant officers. Nevertheless, and whichever one applies, no regulation was adopted by the Secretary under either statue implementing TERA.

28 U.S.C. § 1491 provides in pertinent part:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render any judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . .

Court Rules:

United States Court of Appeals for the Federal Circuit Rule 36 provides in pertinent part:

> The court may enter a judgment of affirmance without opinion citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:
>
> (a) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;
>
> (c) the record supports summary judgment . . .
>
> (e) the judgment or decision has been entered without an error of law.

United States Court of Federal Claims Rule 59 provides in pertinent part:

> (a) Grounds: A . . . rehearing . . . may be granted to all or any parties . . . for any of the reasons established by the rules of common law or equity applicable as between private parties in the court of the United States. On a motion under this rule, the court may open the judgment if one has been entered . . . amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(e) Motion to alter or amend judgment: Any motion to alter or amend a judgment shall be filed not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

A. Factual Background.

Under the record reviewed by the United States Court of Federal Claims, McMullen was a Commissioned Warrant Officer (CW-4 pay grade) on active duty in the Active Guard Reserve having completed 15 years, 9 months, and 14 days of active military service at the time of his release from active duty (REFRAD) on 1 April 1999 together with 9 years, 7 months, and 15 days of inactive duty. He was released from active duty then by action of one Schneider (whose authority to act was challenged before the Court of Federal Claims as not authorized by Congress) who reviewed a recommendation of the Department of the Army Active Duty Board (DAADB) on the alleged grounds of misconduct, moral or professional dereliction of duty. This ground was allegedly based on an Art. 15 (10 U.S.C. § 815) award of punishment.

McMullen contested his release on the ground that none of the alleged bases was legally correct, that he did not commit the alleged offenses factually, that all of this was false as a result of claims of his then wife, whom he was divorcing at the time, as retaliation against him for the divorce, and, finally, that the only reason he accepted an Art. 15 in lieu of court-martial and did not otherwise contest the same before a military judge at a court-martial was that he was assured by his then alleged "Commanding Officer" (an issue in serious dispute whether that officer was authorized to conduct an Art. 15) that "this would end the matter." It did not. Instead, that action triggered the DAADB action by reason of regulation of which McMullen was not advised at the time.

McMullen promptly on October 9, 1999, challenged this action before the Army Board for Correction of Military Records (ABCMR) raising the above issues and other issues, especially the good faith of the action as being a thinly-disguised "draw-down" in order to release him without paying him severance pay. Nevertheless, the ABCMR denied his petition. Appropriate to his Petition before this Court, the ABCMR held as follows: "Therefore, the Board resolved that there is *no basis for returning the applicant to active duty* or to take any of the associated relief actions requested." (emphasis supplied) App. D, p. 6, para. 4.

McMullen was ordered back on active duty as of January 16, 2003, by Order of the Secretary of the Army and his designees who acted without seeking ABCMR approval or did not formally act of record to disapprove the actions of the Board on facts as were before that Board at the time in making its decision. This action occurred while McMullen's appeal to the United States Court of Appeals for the Federal Circuit was pending. Because of that action, McMullen moved for summary reversal before the United States Court of Appeals for the Federal Circuit on the ground that this matter had never come before the United States Court of Federal Claims or the Army Board for Correction of Military Records, but, nevertheless, the United States Court of Appeals for the Federal Circuit could issue summary reversal based on uncontroverted and new facts. The Motions Judge of the United States Court of Appeals for the Federal Circuit did not decide the matter and, instead, forwarded the matter on to the Hearing Panel for decision. *THE HEARING PANEL NEVER DECIDED THIS ISSUE.* App. A and E. After McMullen moved for reconsideration on this issue, *AGAIN THE HEARING PANEL NEVER DECIDED THIS ISSUE.* App. E. There was absolutely no factual basis nor prior review of this matter by the United States Court of Federal Claims to provide any basis whatsoever for the invocation of Court's action under Fed. Cir. R. 36. Summary reversal should have been granted.

B. Proceedings Below.

After decision by the ABCMR, McMullen promptly filed his complaint in the United States Court of Federal Claims claiming numerous errors in his processing as well as other claims for relief raised before said Board. The matter came on for decision on McMullen's Motion for Summary Judgment since there were matters outside of the record included in his Motion and the Defendant's "Motion for Judgment on the Administrative Record" (this was wrongly styled since the government included material not part of the record but no mention made of this by Judge Damich in his Opinion. (*See* App. B). On November 20, 2001, the Court entered an opinion denying McMullen's Motion and granting the Defendant's Motion.

McMullen filed strenuous objection to the personal attacks made in the Court's Opinion and specifically naming the undersigned and McMullen personally in the Opinion in violation of his oath of office as is set forth in 28 U.S.C. § 453, as well as asking him to disqualify himself under 28 U.S.C. § 455(b)(1). McMullen moved both for reconsideration and for amendment of the judgment, the latter contingent on the former, as provided for in United States Court of Federal Claims Rule 59. McMullen asked under his motion for amendment of the judgment for Judge Damich to withdraw his Opinion, to recuse himself, to reassign the matter, and for rehearing, pointing out specifically to the Court the absence of any basis in the record or the briefs for any of the personal attacks and professional slurs (*at least some 16 of such attacks and slurs if not more*). The Court thereafter issued an order allegedly granting reconsideration as to footnote 4 containing the form of the Errata as App. C thereby acknowledging his violation of his oath of office. McMullen referred only to 28 U.S.C. § 453 as the basis for reconsidering this footnote. The Errata as App. C is addressed to the publisher of his Opinion and is verbatim as to his Order.

But, this was only half the loaf. Having now admitted that violation, that violation conclusively tainted his whole Opinion with bias and prejudice and, if not conclusive, at least is prima facie bias and prejudice under 28.U.S.C. § 455(b)(1) and under the "Rules and Guidelines Governing Judicial Behavior" (see below). Judge Damich never acted on McMullen's Motion for Amendment of Judgment which was filed and framed based on an admission of that violation and thereby did not withdraw his Opinion, nor disqualify himself, nor reassign the matter, nor order a rehearing.

On this basis of his admitting his violation of his oath of office and then not granting McMullen's Motion for Amendment of Judgment in light of the now obvious bias and prejudice, McMullen and the undersigned jointly filed a complaint of judicial misconduct against Damich provided for in Appendix B of the United States Court of Federal Claims Rules and assigned by the Court as No. JM3-2002. McMullen added the "Rules and Guidelines Governing Judicial Behavior" *id.*, adopted by the Judicial Conference of the United States including this Court, as a violation of Canons 1 and 3 and, if further investigation as to a companion allegation proved true, Canons 2 and 5. No action was taken by the full court of the United States Court of Federal Claims despite the clear and admitted evidence of judicial misconduct in the record. There is no provision for further appeal in the Appendix.

McMullen timely appealed to the United States Court of Appeals for the Federal Circuit in January, 2002. He promptly moved for summary reversal and a writ of mandamus asking that Court to reverse on the record, to remand the matter, to order disqualification of Judge Damich to hear the matter on remand, and to order reassignment to a different judge for rehearing. The Motions Judge denied the same indicating that said action was for the Hearing Panel. *The Hearing Panel never*

decided this issue, App. A, or reconsideration, App E. Both the Motions Judge and the Hearing Panel thereby ignored the Mandamus petition and violation of the judicial canons, id., even though the Motion as aforesaid and writ of mandamus are separate matters apart from the merits of the Opinion affecting the impartiality imposed by statute and the Due Process rights of McMullen. There was no reference by either authority to the Motion to Amend the Judgment filed in the United States Court of Federal Claims. In short, the Hearing Panel's grounds of affirmance under Fed. Cir. R. 36 was error, since there is no legal basis for the invocation of Fed. Cir. R. 36 to a claim of admitted judicial misconduct.

McMullen additionally and later moved for summary reversal on the basis of the Secretary ordering him involuntarily back to active duty, as is set forth in (A) above.

REASONS FOR GRANTING THE PETITION

I. JUDICIAL MISCONDUCT

A. Policy.

McMullen relies on United States Supreme Court Rule 10(a) on the ground that the United States Court of Appeals for the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings by failing to act on properly presented and legally sound application to that Court for relief and further on the ground that that Court sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers in that the Court did not grant mandamus by the Motions Panel and summary reversal by the Hearing Panel by reason of admitted judicial misconduct, did not order reassignment of the matter, and did not Order rehearing before an impartial judge of the United States Court of Federal Claims.

B. The Writ Should Be Granted to Decide Whether Admitted Judicial Misconduct by the Hearing Judge in the Form of Violation of the Judge's Oath of Office as Set Forth in 28 U.S.C. § 453, After Complaint by Petitioner But Not Withdrawing his Opinion, or Recusing Himself, or Reassigning the Matter, Or for Rehearing as Moved for, Is Grounds for a Per Se Reversal of the Judge's Decision on the Basis of Violation of That Oath As Prima Facie Bias and Prejudice under 28 U.S.C. § 455(b)(1), Or Both Statutes Separately, and Requires an Order by the Court of Appeals for the Federal Circuit for Reassignment and Rehearing before a Different Judge as Petitioned for But Not Acted on by Said Court Resulting in a Violation of the Fifth Amendment Due Process of Law Provision.

This is a novel question to come before this Court. Judicial misconduct has been alleged in prior Petitions before this Court, but insofar as research reveals there is no case in which the misconduct has been admitted. Violation of oath of office as set forth in 28 U.S.C. § 453 *is* judicial misconduct on the face of the statute. Here, the misconduct *is* admitted which provides clear and convincing, at least prima facie, evidence of bias and prejudice blending 28 U.S.C. § 453 with 28 U.S.C. § 455(b)(1), or both statutes separately. Despite pleas and formal filings by McMullen and his counsel to rectify this violation and resulting injustice, nothing has been done about it, either by the judges of the United States Court of Federal Claims or by the United States Court of Appeals. McMullen has been denied Due Process of Law under the Fifth Amendment to the Constitution of the United States for this failure to act. *Matthews v. Eldridge*, 424 U.S. 319 (1975) (Due Process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner'"); *Armstrong v. Manzo*, 380 U.S. 545; *Wiess v. United States*, 510 U.S. 163 (1994); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). McMullen had a very compelling case for relief (and still does,

see Issue No. II below) for numerous, numerous, numerous errors in his processing and has been *deliberately* denied a fair hearing and a resulting injustice because of and by this *deliberately stated* (and admitted) judicial misconduct in the form of violation of oath of office.

Sadly, judicial misconduct is rapidly becoming the norm and not the exception by federal judges in courts throughout the United States and its jurisdictions. The undersigned has practiced law for some 37 years all of it in federal court, before numerous district courts throughout the country, before all but four Circuits, and before hundreds and hundreds if not thousands of federal judges in all of these forums. Until approximately ten years ago, the undersigned never had occasion to question judicial conduct must less file a complaint of judicial misconduct. As has developed during this approximate time, the undersigned has personally experienced or been informed of misconduct taking the form of and including ex parte communication, going outside the record to obtain facts and circumstances and even obtaining credit checks of parties (especially claimants) before the court, back-dating orders in order to avoid consideration of issues, frivolous granting of terms (summarily reversed on appeal), and now admitted violation of oath of office. In addition, and while not misconduct per se, it is, nevertheless, a form of it as is occurring in the Western District of Washington (and elsewhere) where, according to the Court's own statistics, *96% of the civil actions filed are dismissed without a hearing*. This Court needs to be aware of this phenomena if it is not already and, above all, start doing something about it. If this Court does not, who or what entity will?[2]

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2. The August 7, 2002, edition of the Seattle Post-Intelligencer contained an article by one Anne Gearan of the Associated Press wherein

(Cont'd)

Petitioner strongly urges before this Court that this is the case, this is the record, and this is the plain judicial misconduct that should call for this Court to take action. Nothing is in dispute.

McMullen moved for reconsideration of all the professional slurs wrongfully ascribed against and to the undersigned, including footnote 4 of the Opinion, and companion with this moved for amendment of judgment under United States Court of Federal Claims Rule 59 asking that if summary judgment for McMullen is not ordered, that the opinion be withdrawn, that Judge Damich recuse himself, that the matter be reassigned, and that a rehearing be ordered. Judge Damich responded by formal Order and companion errata eliminating the personal name of the undersigned in footnote 4, p. 6 of App. C, as well as eliminating a totally erroneous and uncalled for professional

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(Cont'd)
she reports that 766 ethical complaints were filed in 2001 and in only one case was punishment awarded, that being a private censure without the Judge's name released. One Paul Rice, a law professor at American University, is quoted as saying, "They have an obligation to police themselves, and of course that is the problem . . . We don't like burning brothers in the bond, because you don't know whose ox is going to be gored in the future." By common sense not all of the remaining 765 complaints can be without merit.

As for the Western District of Washington statistics, common sense suggests that not all of these civil cases dismissed are without merit. Granted that some are settled, some are plainly frivolous, and some are voluntarily withdrawn, not all of the remainder of the 96% of cases dismissed are without merit. This is a thinly-disguised violation of the oath of office of the Judges here. The undersigned's experience throughout the United States in terms of such percentage is roughly similar. A very high percentage of plaintiffs' counsel in the local federal court system are complaining about this (although there are no published statistics to support this, but it is nevertheless the #1 subject of practitioners), and yet nothing is being done about it.

slur in that footnote against the undersigned. He did not mention the separate but contingent motion for amendment of judgment. That response is of no moment, since the misconduct was not only committed and admitted, but by itself without more provided clear evidence of bias and prejudice on the record. Even if considered allegedly "corrected", which it plainly cannot be since numerous other plain, unwarranted, and without support in the record, other *personal* attacks and professional slurs were not eliminated and not "reconsidered". Judge Damich was determined and continued to make this case personal against the undersigned and McMullen. As stated, he did not withdraw the Opinion, recuse himself as he should have, and reassign McMullen's matter for rehearing. Finally, he continued the personal attack on McMullen himself without change.

Research reveals only one case in which the issue of the oath of office has been raised, and this was done by the court itself in passing. *Adamson v. C.I.R.*, 745 F.2d 541, 546 (9th Cir. 1984).

The Ninth Circuit has held In Re Charge of Judicial Misconduct, No. 00-80292, a complaint will be dismissed only ". . . if it is directly related to the merits of a judge's ruling in the underlying case," citing to 28 U.S.C. § 372(c)(3)(A)(ii). "If complainant wants to challenge the judge's rulings, correct review procedure, not the procedures for judicial misconduct, [is] the proper remedy," citing to *In re Charge of Judicial Misconduct* (whatever that means and wherever that is found). Here, the matter is NOT directly related to the merits, but is a separate matter raised calling for relief as stated above. Nevertheless, McMullen raised this issue before the United States Court of Appeals for the Federal Circuit in his Briefs and Writ Application, and that Court has taken no action. He was denied Due Process of Law under the composite of authorities raised above.

Authority exists elsewhere for summary reversal based on judicial misconduct. It is done where "prejudicial to the effective and expeditious administration of the Court's business." *Green v. Seymour*, 59 F.3d 1073, 1077 (10th Cir. 1995). Also, "Courts may not reverse a determination made in the trial court's discretion unless the record discloses that the trial court's determination was manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will." *Ligon v. Middletown School Dist.*, 584 A.2d 376, 381 (Pa. Cmwilth. 1990). McMullen has surely met the test set forth by this authority.

As stated above, this matter is personal, not on the merits. To develop this violation and if Judge Damich honestly felt some need to punish the undersigned, he should have taken alleged disciplinary action against the undersigned. He did not (and knew he could not). This is another reason it became personal. If there is any doubt about this not being on the merits but meant to be personal and if Judge Damich honestly believed that the case was without such merit, he could have and should have made his points without such personal attacks (as qualified and competent judges do routinely), and, if anything and standing alone, *his personal attacks indicate that he had very weak, if any, arguments in his Opinion.*[3] McMullen availed

3. Judge Damich had no experience as a judge before he was appointed to the Court of Federal Claims. He did have some very brief experience as an administrative law judge. His appointment clearly resulted from partisan politics. Judge Damich became extremely agitated at the undersigned because the undersigned had to constantly correct as respectfully as possible the error in what he was doing (something the undersigned had never experienced before in any judge), and he thereby "took it out" on the undersigned making it personal. In 37 years the undersigned has never before been chastised whatsoever, never been disciplined, and has an exemplary record in the courts. In that 37 years Judge Damich and one other judge were unqualified to be federal judges,

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and Judge Damich because he has neither the emotional maturity, personal security, judicial restraint, nor experience to be a judge. All that can be said about him is that he is intelligent enough to be a judge. Worse yet, the undersigned gave Judge Damich six weeks notice of several alternative dates for oral argument after sensing his wrath at being constantly corrected, including the date of November 20, 2001, when scheduled before Judge Bruggink (a fine jurist, by the way) in the Court of Federal Claims in Washington, DC. Judge Damich nevertheless *issued his opinion on that same day without oral argument.* It is over 3000 miles for the undersigned to travel to Washington, DC. If Judge Damich honestly was true to his convictions and was judicial in his approach and temperament, he should have had the courage to face the undersigned directly with these accusations and not issue personal attacks without opportunity to respond. *THE FOLLOWING STATEMENT IS THE CRUX OF THIS ISSUE*: a case can be made that he structured this opinion knowing that judicial misconduct is seldom, if ever, found and, worse, the judge is almost always upheld against the lawyer or client making the claim. He did not want to take the chance of being reversed (and the tenacity and intensity of his opinion suggests something else is going on here outside the record). *He has thereby effected a stratagem for other judges to follow in opinion-writing to insulate a judge from reversal.* McMullen argued this in his motions for reconsideration and amendment of judgment before Judge Damich. Judge Damich appeared frantic in that he had to do something and tried valiantly to insulate the decision from reversal; but he could not do so unless some of his personal attacks on the undersigned and McMullen remained. Unfortunately he was dealing with the wrong person. *THIS IS PRECISELY WHY THIS WRIT SHOULD BE GRANTED.* Unfortunately, the United States Court of Appeals did not take notice of this. The undersigned is certain that the reason Damich did not allow oral argument is that he was afraid his errors would be pointed out all too clearly on the record once more.

Lawyers caution the undersigned to take the safe course and do nothing about this. If the undersigned were a coward, that would be the correct option. Lawyers also aver that the expedient thing to do is to forgo any such claim lest the lawyer incur judicial hostility about the

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himself of every known procedure to invoke reversal and reassignment of his matter, and no Judge or Court would honor such a plain matter of misconduct (see footnote 2). He has been denied Fifth Amendment Due Process of Law as has been argued above.

The dilemma of a trial lawyer confronted with such false accusations and personal and professional attacks is the following: if the lawyer does not contest this, the lawyer by silence gives notice of assent to the false accusation and personal attack thereby affecting his credibility on appeal and considerably weakening his argument on appeal; on the other hand, if the lawyer challenges that, the issue before reviewing judges becomes whether the lawyer or the judge will be upheld, and the merits of the case go languishing. The likelihood of the lawyer being upheld in this scenario is nil in practical terms. (Again, see footnote 2).

The United States Court of Appeals for the Federal Circuit relied on Fed. Cir. R. 36. It is important to take notice that judicial misconduct cannot be dismissed or ignored when the misconduct is not *directly* related to the merits. 28 U.S.C. § 372(c)(3)(A)(ii). The Court did not take into account the judicial misconduct in so doing. *There is no provision in Fed. Cir. R. 36 for ignoring this claim.* Nor did the Court take into account the lack of substantial evidence to support the factual errors recited by Judge

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claim and turn that wrath against the undersigned. If the undersigned were politically oriented, the undersigned would do this. Lawyers also say this is an unpopular claim to make before any court. If vanity were at issue, the undersigned would do this. *But, and to paraphrase a national leader from a past era, there comes a time when a lawyer must take a position that is neither safe, nor politic, nor popular, and the lawyer must take that position because it is right. The undersigned so takes this stand in this matter because it is right to bring this before this Court for action and correction.*

Damich in his Opinion which call for reversing the granting of the Defendant's alleged "judgment on the administrative record". In short, the Court of Appeals for the Federal Circuit did not act on the issues raised on judicial misconduct by McMullen. Rank injustice has occurred.

McMullen pleads with this Court to Order the Court of Appeals for the Federal Circuit to reverse this matter and Order a rehearing before an impartial, qualified judge This is a proper basis of issuing the Writ applied for in this Petition, and the Writ should be granted on this basis accordingly.

This Court must exercise its power and authority to take action against judicial misconduct, and this is then an important question to be decided by this Court.

II. ADMINISTRATIVE SETTLEMENT WITHOUT COURT APPROVAL

A. Policy.

McMullen relies on United States Supreme Court Rule 10(c) wherein Court of Appeals for the Federal Circuit failed to decide an issue properly raised before it and pending at the time of decision and reconsideration. The United States Court of Appeals for the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings by failing to act on properly presented and legally sound application to that Court for relief as to call for an exercise of this Court's supervisory powers. McMullen has been denied Due Process of Law.

B. The Writ Should be Granted on the Ground That the Secretary of the Army Reached an Administrative Settlement of the Petitioner's Claim for Reinstatement to Active Duty by Ordering Petitioner Back to Active Duty during Pendency of Decision before the United States Court of Appeals for the Federal Circuit without Notice or Approval from the Court And Relief Afforded under the Jurisdiction of the United States Court of Claims, When That Court Had Before It Review of the Decision of the Army Board for Correction of Military Records which Denied Petitioner's Eligibility for Reinstatement to Active Duty, Thereby Binding All Officers of the United States Army under 10 U.S.C. § 1552, As Moved before That Court for Summary Reversal by Petitioner But Not Acted on by That Court.

McMullen relies on his Statement of the Case as the factual basis to support this Issue.

It must be emphasized that the Army Board for Correction of Military Records decided in several places in its decision that McMullen had allegedly committed "misconduct and moral or professional dereliction". App. D. *OF CRITICAL IMPORTANCE, HOWEVER, THE BOARD SPECIFICALLY DECIDED, "THEREFORE, THE BOARD RESOLVED THAT THERE WAS NO BASIS FOR RETURNING THE APPLICANT TO ACTIVE DUTY OR TO TAKE ANY OF THE ASSOCIATED ACTIONS FOR RELIEF.*" App. D, p. 33a, para. 4. On this basis McMullen was not allowed to return to active duty.

As to the decision of a correction board according to 10 U.S.C. § 1552(a)(4), "*. . . a correction is final and conclusive on all officers of the United States.*" If that provision as to the word "correction" is not applicable and McMullen's record cannot otherwise be corrected under the general power of the

Secretary under 10 U.S.C. § 1552(a)(1), collateral estoppel applies as to subsequent action by a party inconsistent with the decision of the Board. *Weir v. United States*, 474 F.2d 617 (Ct. Cl. 1973), *cert. denied*, 94 S. Ct. 574 (1973). That the Secretary of the Army or any other officer in McMullen's chain of command involved in ordering him back to active duty is an "officer of the United States" cannot be gainsaid. Estoppel against the Secretary applies unless McMullen's record is corrected.

McMullen presented to the United States Court of Appeals for the Federal Circuit evidence in his "Declaration in Support of Motion for Summary Reversal . . ." in the form of copies of his orders, as well as other facts, that he was back on active duty. There is no evidence in any of these documents that the Secretary, or his designees, returned to the Army Board for Correction of Military Records to ask that Board to overturn or otherwise reverse its decision. Thus, on the record before both courts McMullen could not be ordered back to active duty.

However, it is plain the Secretary and his designees corrected McMullen's record by conduct and action. In order for the Secretary or his designees to order McMullen back to active duty the Secretary had to overturn the decision of that Board barring McMullen from being back on active duty. Had he chose to do so, McMullen could have been released from the order to active duty because of the decision of the Board, since nothing had changed insofar as the facts forming the basis for the decision as to alleged misconduct. A finding of misconduct is disqualifying for active duty in any case under AR 600-8-24, the AR in effect at the time the Secretary ordered McMullen back to active duty. However, the Secretary has the authority to set aside the decision of the Board under 10 U.S.C. § 1552(a)(1). This authority is also found in Army Regulation 600-8-24, para. 2-31(a), as the regulation under which McMullen

was processed for release from active duty, wherein the regulation provides: "[a]pproval to release or retain an officer . . . is the Secretary of the Army or his or her designated representative."

The decision then of the Secretary to overturn the Board and order McMullen back to active duty means that McMullen would be eligible to be back on active duty. This, in turn, means that McMullen was wrongfully processed for release from active duty in the first place since alleged misconduct no longer exists as a means of separating him from active duty, and it also means that the Secretary would have to find that the allegations of misconduct, upon which his release were based under regulation, either were not found or the findings were in error. *IN OTHER WORDS THE SECRETARY HAS NO ALTERNATIVE BUT TO FIND ERROR OR INJUSTICE IN ORDER TO CORRECT MCMULLEN'S RECORD IN ORDER TO CLEAR MCMULLEN'S RECORD ALLOWING HIS RE-ORDERING TO STAND.* To re-emphasize, McMullen would have no basis on this record to apply for active duty again in the Army as long as that decision of the correction board is extant. Moreover, it is in McMullen's interest for the Secretary act on his behalf to correct his record in order for him to be allowed to go back on active duty. For the record on appeal before the United States Court of Appeals for the Federal Circuit, McMullen stipulated, without waiving his claims before the courts and only for purposes of settlement, that he agreed to the orders back to active duty and would not otherwise challenge the same even though he had a right to do so. McMullen wants to serve his country among other personal and financial reasons, as he did in Viet Nam. Settlement was reached on the issue of his right to be retained on active duty.

Furthermore, in order for the Secretary to reverse the decision of the Army Board for Correction of Military Records

he or she must do so *BASED ON THE SAME FACTS AND CIRCUMSTANCES AS OCCURRED BEFORE THE BOARD IN ITS DECISION*. The leading case supporting this long-standing in the United States Court of Federal Claims is *Boyd v. United States*, 207 Ct. Cl. 1 (1975). There the Court held:

> [a]s we said in *Proper* [v. United States], 139 Ct. Cl. at 526, 154 F.Supp. at 326, "we do not suggest that the Secretary may not overrule the recommendations of the Correction Board where the findings of the Board are not justified by the record on which the findings were made." (case cited) The court, in turn, may reject the decision of a Secretary only if he has exercised his discretion arbitrarily, capriciously, in bad faith, contrary to substantial evidence, *or where he has gone outside the board record*, or fails to explain his actions, or violates applicable law or regulation. Then we will not hesitate to set him right. (cases cited) *A decision which is contrary to all evidence would clearly be arbitrary*. (case cited).

Accord: *Horn v. Schlesinger*, 514 F.2d 549, 553 (8th Cir. 1975).

Without such action by the Secretary, the alleged misconduct ascribed to McMullen remained disqualifying, and the Secretary reached his decision by excusing, condoning, or otherwise waiving any such alleged misconduct. The Secretary could not go outside the record by citing to new facts not before the Board (such as the war in Iraq) and to rely on any new facts would be arbitrary and capricious. *Id. Boyd*; *Id. Horn*.

By ordering McMullen back to active duty the Secretary or his designees have not abided the facts and circumstances of the correction board action. As stated above, they have by action and conduct reversed said action. That being the case, McMullen is now eligible to return to active duty because the Board decision

is no longer in effect. Unless this is supported by the Court, the orders back to active duty are void and of no effect in violation of the decision of the correction board. It is certain that this is not the action the Secretary desires (as does McMullen for purposes of settlement) since McMullen is needed in Iraq and is, in fact, there. The Secretary clearly by his action has reversed the decision of the Correction Board. This reversal is well within his authority to do this. *Id. Boyd*; *Id. Horn*.

However in so doing and because of this case authority, this now means that McMullen never should have been released from active duty in the first place because of this reversal. Furthermore, the Secretary should have reinstated McMullen to active duty effective 1 April 1999. Having done this, McMullen would be then entitled to backpay and allowances from that date to date of reinstatement, and his record would be corrected to show that he was on active duty during this period for purposes of promotion and retirement credit. This is precisely the relief McMullen sought in filing his action in the United States Court of Federal Claims. This action of the Secretary in ordering McMullen back to active duty (and agreed to by McMullen for purposes of settlement) *is an administrative settlement of the case*, but without paying McMullen his backpay and allowances and correcting his record to which he is entitled and without order of the Courts.

The Secretary should have advised the courts of this action and settlement and did not.[4] The Secretary has not paid

4. McMullen also argued to the United States Court of Appeals for the Federal Circuit that government lawyers had a duty as officers of the Court to advise that Court of this change in circumstance without McMullen having to do so. Instead, the government lawyers presented a makeweight and totally erroneous argument that McMullen was not authorized by the ABCMR decision to go back to active duty as a member (Cont'd)

McMullen his backpay and allowances and has not corrected his records. If the court would have been so advised, it is plain that the court would have ordered such relief since it is clearly the rule in all courts that settlements are encouraged. *United States v. McInnes, et al.*, 556 F.2d 436 (9th Cir. 1977), where the Ninth Circuit stated that to be the policy of the Courts and imposed a settlement on the parties on the record before the court even though the parties had not formally agreed to such a settlement or even raised the issue on appeal.

The United States Court of Appeals did not decide this issue, even though raised three times: (1) by motion; (2) by extended oral argument well beyond the 15 minutes per side allowed; and, (3) by motion for reconsideration. Fed. Cir. R. 36 first came up in the decision of the panel. App. A. Fed. Cir. R. 36 on its face simply cannot apply since the orders to active duty were issued while McMullen's matter was on appeal and because

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of Active Guard Reserve. There is nothing of the kind in the ABCMR decision or under the definition of "active duty" as defined in 10 U.S.C. § 101(d)(1) or that he was not under the exemption for "full time National Guard duty" as defined in (d)(5), since none of the references in (d)(5) to Title 32 apply to McMullen. Moreover, McMullen put these lawyers on notice after they, in fact, had notice of this change of circumstance that they should produce a document from the Secretary authorizing them to take this position contrary to the ABCMR action which, as indicated, had found that McMullen was not authorized to be back on active duty, and they did not. *The ABA Model Rules of Professional Conduct in RPC 1.4 applies to government lawyers, and the government lawyers have a "duty to keep the client informed about important information".* McMullen stated that these lawyers did not have any such authority from the Secretary or anyone else and acted strictly on their own. *The United States Court of Appeals surely had a duty to require these government lawyers to produce any evidence or authority from the Secretary to the contrary and did not.* There is no known authority to support this claim. It has to be inherent in the Due Process Clause.

nothing of this claim had ever came before the United States Court of Federal Claims. *This is plain error and outside the realm of any known procedure of any court.* McMullen has again been denied Due Process of Law as set forth above. Rank injustice occurred.

On this basis the Writ should be granted. Administrative settlement is an important question to be decided by this Court.

III. "JUSTICIABILITY" SHOULD NOT BE ASCRIBED BY THE UNITED STATES COURT OF FEDERAL CLAIMS TO A CLAIM BY A MILITARY RESERVE OFFICER WHEN THE COURT REVIEWS A DECISION BY A MILITARY CORRECTION BOARD ESTABLISHED UNDER 10 U.S.C. § 1552 UNDER CONCEPTS OF SUBJECT MATTER JURISDICTION

A. Policy.

McMullen relies on Rule 10(c) of this Court on the basis that the United States Court of Federal Claims has applied the judicial concept of "justiciability" to claims of Reserve officers on active duty sitting in review of a decision of a military correction board under 10 U.S.C. § 1552 without taking into account that the Court's review is the same as and governed by the coextensive subject matter jurisdiction of the military correction board under the Congressional mandate "to correct error and remove injustice" on a case otherwise within its jurisdiction conferred by 28 U.S.C. § 1491.

This Writ Petition raises an important question of federal law that has not been, but should be, settled by the United States Supreme Court, since all courts of original jurisdiction and on appeal have not squarely decided, or refused to decide, this issue of applying their review to be coextensive with the subject matter jurisdiction conferred on the military correction board. This is an extremely important issue to Reserve officers on active duty and other military personnel in other settings or status, since

otherwise meritorious claims made before a military correction board are being systematically dismissed by all courts on the basis of alleged "justiciability" in cases otherwise within their jurisdiction.

B. No Case in the Circuit Courts in the Court of Appeals for the Federal Circuit, in the United States Court of Claims, Or in this Court Has Squarely Held That Review by a Court of a Decision by a Military Correction Board Removes Review of That Case from the Concept of "Justiciability " on the Ground That the Reviewing Court Has the Same Subject Matter Jurisdiction Conferred on a Correction Board.

McMullen's claim was dismissed in part based on the concept of "justiciability" since he was a Reserve officer on active duty and Reserve officers serve at the pleasure of the Secretary of the military department. *Murphy*, 993 F.2d 871, citing to 10 U.S.C. § 681a, *Id.* at 872 (now codified in 10 U.S.C. § 12313(a)) In one issue, for example, McMullen applied for TERA and other relief based on TERA before the ABCMR, and said relief was denied. Neither the United States Court of Federal Claims nor the United States Court of Appeals for the Federal Circuit addressed McMullen's arguments on this issue even though before both Courts in McMullen's briefs.

On remand, the United States Court of Federal Claims should be directed to apply the subject matter jurisdiction of a correction board in review of McMullen's claim made before a correction board.

McMullen argued to both courts that the subject matter jurisdiction of military correction boards is imposed on reviewing courts and is the same as and coextensive subject matter jurisdiction as that of the military correction board. McMullen argued that no case in any court, including this Court, has ever held precisely that review by a military correction board removes the case from the legal doctrine of "justiciability" in

the reviewing court on appeal. The reason is that the subject matter jurisdiction of a military correction board is "to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). McMullen argues that the reviewing court has the same power, the same as any other appellate court under the original jurisdiction conferred, and, additionally, to ascribe the same law to of the claimant as does the military correction board, in this case the power "to correct error or remove injustice." It would be different if the reviewing court sat hearing an original claim, absent review and decision by a military correction board. Then, in that case, "justiciability", or the lack of it, would or could be applied depending on the statute or regulation being reviewed.

Since 1993, the United States Court of Federal Claims has relied on *Murphy v. United States*, 993 F.2d 871, as precedent for applying the concept of "justiciability", or the lack thereof, to claims of Reserve officers on active duty. It should be noted at this point that *Murphy* held that "justiciability" is separate from jurisdiction and "must first [be] assess[ed] . . . by determining what limits were placed on the Secretary's discretion to release a reserve (sic) officer from active duty." *Id.* at 873 The Court then in *Murphy* discussed the applicability of the jurisdiction (*not justiciability*) conferred on a military correction board as limiting review by the Court of Appeals for the Federal Circuit:

> Section 1552(a) describes the Correction Boards' jurisdiction to act on behalf of the Secretary to 'remove an injustice.' It says absolutely nothing about the Claims Court's jurisdiction which is circumscribed solely by the Tucker Act, 28 U.S.C. § 1491, and which demands that the government be called upon to answer in money. Absent that,

> there is no review in the Claims Court of alleged 'injustice'.

Id. at p. 874.[5]

Cases in the Court of Federal Claims (and its predecessor courts) do discuss the subject matter jurisdiction of a military correction board in relation to error and injustice, but do not reach the issue as argued here as to elimination of "justiciability" in review of a military correction board decision. *See generally*, *Sanders*, 594 F.2d at 804; *Murphy*, 993 F.2d at 871; *Reale*, 208 Ct. Cl. at 1010; *Sawyer*, 18 Cl. Ct. at 860.[6] *Sanders* involves the claim of a Regular officer, but nevertheless that which is argued for here is still applicable in terms of the subject matter jurisdiction of the reviewing court, or the lack of reference to the issue, as reflected in the opinions of the courts.

What has occurred here in both District Courts and the United States Court of Federal Claims is that the concept of "justiciability" has been engrafted onto claims of Reserve officers, which includes McMullen, by this authority. That authority is, however, misapplied in relation to the subject matter jurisdiction of a military correction board as conferred by Congress.

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5. This language is squarely in conflict with the language of the Court of Appeals for the Federal Circuit in *Sawyer v. United States*, 18 Ct. Cl. 860 (1989), *reversed on other grounds*, 930 F.2d 1577 (CAFC 1991), and *Reale v. United States*, 208 Ct. Cl. 1010, *cert. denied*, 429 U.S. 854 (1976), *cert. denied*, 429 U.S. 988 (1976).

6. One known case styled *Fisher v. United States*, No. 02-5082 is pending as of the preparation of the this Writ before the Court of Appeals for the Federal Circuit on this issue. This Court may well want to defer decision on this Writ until *Fisher is* decided. *Fisher* was argued on December 2, 2002, and the panel requested further briefing on this as well as other issues, which briefs were supplied to the court on or about December 29, 2003.

This Court must review this issue so that the courts of original jurisdiction below can reach uniformity as to the scope of the doctrine of "justiciability" when a court reviews a decision of a military correction board as to a Reserve officers under the mandate to "correct an error and remove an injustice".

The Writ should be granted on this issue. It is an important issue of law which should be, but has not, been decided by any court.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES BYRON HOLCOMB
Attorney for Petitioner
P.O. Box 10069
Bainbridge Island, WA 98110
(206) 842-8429

APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED AUGUST 5, 2003

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-5054

LYLE D. MCMULLEN,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the United States Court of Federal Claims, CASE NO(S). 00-CV-518.

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (BRYSON, DYK, and PROST, *Circuit Judges.*)

AFFIRMED. *See* Fed. Cir. R.36

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly
Jan Horbaly

DATED: August 5, 2003

APPENDIX B — OPINION OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED NOVEMBER 20, 2001

UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-518 C

(Filed: November 20, 2001)

LYLE D. MCMULLEN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

OPINION

DAMICH, Judge.

This case is before the Court on the Defendant's motion to dismiss pursuant to Rule 12(b)(4) of the Rules of the Court of Federal Claims ("RCFC") or, in the alternative, motion for judgment upon the administrative record[1] pursuant to RCFC 56.1 and the Plaintiff's motion for judgment upon the administrative record pursuant to RCFC 56.1. The Plaintiff challenges the decision of the Army Board for Correction of

1. The Plaintiff incorrectly stylized his motion as a "motion for summary judgment."

Military Records ("ABCMR") upholding his involuntary removal from active duty and the imposition of non-judicial punishment upon him under Article 15 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. § 815. He requests correction of his military records, reinstatement, back pay and allowances, and placement in retirement status provided by Temporary Early Retirement Authority ("TERA"), 10 U.S.C. § 1293, note 1, or, in the alternative, separation pay in light of his honorable characterization of his active duty service. For the reasons enumerated below, the Court GRANTS the Defendant's motion to dismiss in part and GRANTS its motion for judgment upon the administrative record in part. The Plaintiff's motion for judgment upon the administrative record is DENIED.

I. Background

The Plaintiff, Lyle D. McMullen, served on active duty in the U.S. Army Active Guard Reserve ("AGR") program as a commissioned Chief Warrant Officer/W-4 ("CW4") from January 11, 1987, until he was released from active duty ("REFRAD") on April 1, 1999. At the time of his release, the Plaintiff had completed 15 years, 9 months, and 14 days of active federal service and over 9 years of inactive service. *Administrative Record* ("*AR*") at 3, 30.

On February 14, 1997, an investigating officer was appointed to conduct an investigation into alleged misconduct by the Plaintiff, pursuant to Army Reg. 15-6.[2] This investigation was conducted following allegations of misuse

2. Army Reg. 15-6, *Procedural Guide for Investigating Officers,* dated September 30, 1996.

of a government credit card, making false statements to obtain permissive leave, making false claims for pay and allowances, fraternization with an AGR sergeant, adultery with an AGR sergeant, making false official statements that he was married in an application for married government housing, and intimidation of a witness. *AR* at 3. On March 7, 1987, the investigating officer recommended that court-martial charges be preferred against the Plaintiff with respect to some of these allegations. *AR* at 4.

On January 11, 1998, the Plaintiff accepted, in lieu of a trial by court-martial, non-judicial punishment under 10 U.S.C. § 815 for violations of UCMJ Articles 107 (false official statements related to his marital status), 134 (obstruction of justice by attempting to influence the testimony of a witness), and 92 (violation of a lawful order to refrain from contacting any witnesses in the investigation against him). *Id.* After having been afforded the opportunity to consult with counsel, the Plaintiff elected not to have a person speak on his behalf or to present in person matters in defense, mitigation, and/or extenuation. *AR* at 19. On January 22, 1998, Brigadier General ("BG") James M. Collins, Jr., Deputy Commander of the 70th Regional Support Group, imposed a punitive letter of reprimand as non-judicial punishment. *AR* at 19-21. The Plaintiff elected not to appeal this decision. *AR* at 19.

The Plaintiff's case was then submitted to the Department of the Army Active Duty Board ("DAADB") pursuant to the provisions of Army Reg. 600-8-24, *Officer Transfers and Discharges,* dated July 21, 1995, ¶ 2-31. On February 8, 1999, the DAADB recommended that the

Appendix B

Plaintiff be involuntarily REFRAD, with an honorable characterization of service, because of "misconduct, moral or professional dereliction of duty and for substandard performance." *AR* at 24. On February 11, 1999, the Deputy Assistant Secretary of the Army for Army Review Boards ("DAS") Karl Schneider, approved the Plaintiff's involuntary REFRAD because of "misconduct, moral or professional dereliction of duty, with an Honorable Discharge." *AR* at 29.

On April 1, 1999, the Plaintiff was REFRAD with an honorable characterization of service and assigned to the U.S. Army Control Group (Reinforcement), retaining his commission as a CW4 in the Reserves. *AR* at 128. The Plaintiff's DD Form 214, Certificate of Release or Discharge From Active Duty, reflects separation without separation pay with a Separation Program Designator code of LGH (for non-retention on active duty). *AR* at 134.

On October 9, 1999, the Plaintiff petitioned the ABCMR for relief, including the removal of the non-judicial punishment from his record, reinstatement to active duty, receipt of back pay and allowances, and retirement for length of service, if eligible. *AR* at 3. In the alternative, the Plaintiff sought the payment of separation pay based on his honorable characterization of service. *Id.* As the basis for such relief, the Plaintiff maintained that he was wrongfully denied separation pay because the regulation denying separation pay does not comport with the statute authorizing separation pay; that the Article 15 non-judicial punishment imposed on him was void because BG Collins, a reserve officer not on active duty, did not possess legal authority to conduct the Article 15 proceeding on a reserve officer on active duty even though

he was within that officer's command; and that the Article 15 action against him was void because the charges against him were without legal or factual basis. *Id.* On May 25, 2000, the ABCMR denied relief, finding that: "The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice." *AR* at 8. More specifically, the ABCMR found that the Plaintiff's separation was directed to the appropriate authority based on the finding of a properly constituted DAADB; that BG Collins was entitled to administer the Article 15 action against the Plaintiff; and that, even if the Article 15 action was null and void, the findings of moral or professional dereliction in the investigation proceedings against the Plaintiff constituted a sufficient basis for the REFRAD action. *AR* at 6-7.

In this proceeding, the Plaintiff challenges the imposition of non-judicial punishment under Article 15 of the UCMJ, his release from active duty without separation pay by the DAADB, and the ABCMR's decision affirming his separation. In addition to seeking reinstatement to active duty, he maintains that he is eligible for early retirement pursuant to 10 U.S.C. § 1293, note 1.

II. Failure to State a Claim

A. Standard

"A motion to dismiss under Rule 12(b)(4) for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not under the law entitle him to a remedy . . . . In reviewing the dismissal under

Rule 12(b)(4), we are mindful that we must assume all well-pled factual allegations as true and make all reasonable inferences in favor of . . . the nonmovant." *Perez v. United States,* 156 F.3d 1366, 1370 (Fed. Cir. 1998). "Dismissal under Rule 12(b)(4) is appropriate only when it is beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief . . . . Because granting such a motion summarily terminates the case on its merits, courts broadly construe the complaint, particularly in light of the liberal pleading requirements under the Federal Rules of Civil Procedure." (Citations omitted; internal quotation marks omitted.) *Ponder v. United States,* 117 F.3d 549, 552-53 (Fed. Cir. 1997), *cert. denied,* 522 U.S. 1110 (1998). In the present case, the Defendant argues that the Plaintiff's reinstatement and TERA claims are nonjusticiable.

B. Whether the Plaintiff's Reinstatement and TERA Claims Present Nonjusticiable Issues

1. Reinstatement

The Defendant argues that the Plaintiff's claims for reinstatement are nonjusticiable because 10 U.S.C. § 12313(a) ("Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.") gives the Secretary of the Army the discretion to release a Reserve from active duty at any time. Regrettably, the Plaintiff fails to address the Defendant's nonjusticiability argument, but instead seems to conflate the concept of justiciability with jurisdiction. This failure is particularly regrettable because the Defendant has pressed its nonjusticiability argument somewhat further than warranted. This Court possesses subject matter

jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), which provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any Act of Congress." The Plaintiff's basic entitlement for back pay, reinstatement, and correction of records is provided by 37 U.S.C. § 204(a)(1). However, justiciability is a distinct concept from jurisdiction. Once it has been established that this Court has jurisdiction over a controversy, it must then be determined "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Murphy v. United States,* 993 F.2d 871, 872 (Fed. Cir. 1993), *cert. denied,* 511 U.S. 1019 (1994) (quoting *Baker v. Carr,* 369 U.S. 186, 198 (1962)). The judiciary does not have the competence to review the merits of the military service secretary's substantive decisions regarding the conduct of military affairs. *Adkins v. United States,* 68 F.3d 1317, 1322 (Fed. Cir. 1995). Such disputes are nonjusticiable as a matter of policy because "judges are not given the task of running the Army . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters. . . ." *Orloff v. Willoughby,* 345 U.S. 83, 93-94 (1953). An example of a substantive decision by the military would include the specific merits of a decision to release a person from military service. *Murphy,* 993 F.2d at 874. Such claims are nonjusticiable because, under 10 U.S.C. § 12313, the Secretary of the Army is given discretionary authority to release a reservist from active duty at any time.[3]

3. "Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty." 10 U.S.C. § 12313(a).

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Even though this statute on its face does not provide any procedural or substantive limitations on the discretion of the Secretary of the Army to release a reservist from active duty, the Secretary's discretion with respect to the Army's compliance with its own regulations and procedures is not unfettered. It is well-established in this Circuit that the failure of a branch of the military to follow its own procedure in rendering a military decision, including the release of a reservist from active duty, is a claim that is justiciable in this Court. *See, e.g., Adkins,* 68 F.3d at 1323 ("[A] challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy"); *Murphy,* 993 F.2d at 873 ("[W]hen the military is given unlimited discretion by Congress, it is nevertheless bound to follow its own procedural regulations if it chooses to implement some."); *Sargisson v. United States,* 913 F.2d 918, 921 (Fed. Cir. 1990) ("[O]nce the Secretary promulgated regulations and instructions and made them the basis for [a reservist's] release, his action became subject to judicial review for compliance with those regulations and instructions, even though he was not required to issue them at all."). These claims are justiciable because "the test or standards against which this court measures the military's conduct are inherent; they are the applicable statutes and regulations." *Adkins,* 68 F.3d at 1323. Therefore, to the extent that a reservist challenges a decision of the military corrections board upholding his release from active duty on the basis that the military did not properly apply its own regulations and procedures, a reinstatement claim does present a justiciable controversy. *See Skinner v. United States,* 219 Ct.Cl. 322, 334 (1979) (plaintiff reinstated to active duty upon a wrongful separation by permanent selection board due to improper application of legal procedures).

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In this case, the Plaintiff presents a veritable grab-bag of arguments as to why the ABCMR, in his view, incorrectly upheld the Army's REFRAD action. Such arguments include: (a) the Article 15 action conducted against him is void because his due process rights under the Fifth Amendment were violated in various ways throughout the course of the proceeding; (b) the Article 15 action conducted against him is void because BG Collins, his commanding officer, a reservist not on active duty, was not authorized to conduct the Article 15 action against a reservist on active duty; and (c) DAS Schneider was not authorized to release the Plaintiff from active duty upon the recommendation of the DAADB. The issues of whether DAS Schneider was authorized to release him from active duty and whether BG Collins had the authority to conduct an Article 15 action are, at least in theory, procedural challenges to the Army's REFRAD actions because the Court can adjudicate these questions without reviewing the merits of the underlying rationale for the Army's actions.

However, the supposed due process issues raised by the Plaintiff are another matter. The Plaintiff claims that his right to due process was violated because: (i) the Investigating Officer could not have prohibited him from contacting witnesses, (ii) he was denied the right of representation of counsel at his Article 15 proceeding, (iii) his commanding officer was not legally trained, and (iv) he could not have been found to have made a false official statement that he was married in his application for married housing because, evidently, marriage laws are so complicated and vary so much from state to state that he could not have known that he was

in fact not married. Even if, for the sake of argument, this Court were willing to accept the Plaintiff's highly suspect claim that he could not have known whether he was in fact married; or his avant-garde due process theory that, in order to instill rudimentary discipline among the rank-and-file, a commanding officer must be burdened with having to take unspecified legal courses in addition to his other pressing duties; or that the military is somehow precluded from preventing a service member under investigation for misconduct from engaging in witness tampering, this Court could not entertain any of his claims for two reasons. First, even if the Plaintiff did present genuine due process issues before this Court, he cannot state a claim for alleged due process violations, including his denial of counsel claim, resulting from an Article 15 action because non-judicial punishment, unlike a general court- martial, is not a formal criminal proceeding. *Compare Fairchild v. Lehman,* 814 F.2d 1555, 1558 (Fed. Cir. 1987) *and Dumas v. United States,* 223 Ct.Cl. 465, 473-74 (1980) (Court of Claims may not review Article 15 actions for due process violations) *with Longval v. United States,* 41 Fed.Cl. 291, 295 (1998) (Court of Federal Claims may review court-martials for significant constitutional defects that deprived the plaintiff of due process). Instead, Article 15 of the UCMJ, 10 U.S.C § 815(a) codifies the authority of a commanding officer to punish service members for minor offenses, § 815(b), unless the service member demands a court-martial instead of non-judicial punishment. These proceedings are administrative, rather than criminal, in nature. *Middendorf v. Henry,* 425 U.S. 25, 31-32 (1976). Therefore, due process rights under the Fifth Amendment do not attach to Article 15

actions. *Dumas,* 223 Ct.Cl. at 476.[4] Second, the claims that the investigative officer could not have forbidden the Plaintiff to contact witnesses and that the Plaintiff could not have stated falsely that he was married are nonjusticiable because the claims are a transparent attempt to attack the substantive merits of the Army's decision to release him from active duty even though the claims are presented under the supposed guise of the Fifth Amendment.

Furthermore, while the Plaintiff's claim that his commanding officer did not have the authority to impose non-judicial punishment under Article 15 is, at least in theory, a procedural challenge to his non-judicial punishment, it is nevertheless irrelevant to the disposition of this case. The ABCMR explicitly held that even if the Article 15 action was void the REFRAD action was still proper. "The applicant's moral or professional [dereliction] was established in the findings of the Army Regulation 15-6 investigation of his conduct which found that he violated

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4. The Plaintiff cited *Dumas* in its reply brief for the proposition that this Court could review Article 15 actions for due process violations despite the fact that *Dumas,* as discussed above, clearly held that due process rights under the Fifth Amendment do not attach to Article 15 actions accepted by a service member. Furthermore, even as a factual matter, the Plaintiff sought legal advice during the investigation, *AR* at 11, and the Plaintiff signed the Record of Proceedings of the Article 15 action which informed him of his right to consult with legal counsel and initialed the portion of the Record of Proceedings which stated that "[h]aving been afforded the opportunity to consult with my counsel, my decisions are as follows. . . ." *AR* at 19. The Court is at a loss to understand why Plaintiff's counsel would present the Court with such patently frivolous arguments.

several articles of the UCMJ. Therefore . . . the applicant's separation for misconduct, moral or professional dereliction would remain a proper and equitable outcome [even] were the NJP action overturned." *AR* at 7. Even if this Court were to agree with the Plaintiff that his commanding officer did not have the authority to conduct an Article 15 proceeding against him, the Plaintiff would still be faced with the nonjusticiable determination of the ABCMR that his separation was warranted by the findings of the investigative officer. "To overturn the ABCMR's decision would require this Court to second-guess whether the officer should have been released. . . ." *Walters v. United States,* 37 Fed.Cl. 215, 221 (1997). Had the Plaintiff's commanding officer imposed a monetary penalty as a consequence of the non-judicial punishment, such as a forfeiture in pay, the Court may well have reviewed the commanding officer's authority to impose non-judicial punishment. This Court has the authority to hear challenges of Article 15 actions that result in the imposition of monetary penalties. *Wales v. United States,* 14 Cl.Ct. 580 (1988), *aff'd,* 865 F.2d 268 (Fed. Cir. 1988) (table). However, as a direct consequence of the Article 15 action itself, he only received a letter of reprimand and did not lose any payments to which he was entitled. Consequently, the Court will not address the issue of whether BG Collins had the authority to conduct an Article 15 action because it is not necessary to resolve any issue in this case.

Therefore, the Court holds that the Plaintiff cannot state a claim in this Court for any of his challenges to his Article 15 action, and, to the extent that these issues require the adjudication of the substantive merits of his Article 15 action, the Plaintiff presents nonjusticiable issues, and the Court

accordingly dismisses them. However, the Plaintiff's claim that DAS Schneider did not have the authority to separate him from the service is a justiciable controversy that this Court may resolve because, in so doing, the merits of the decision to release the Plaintiff from active duty need not be adjudicated.

2. TERA Status

The Plaintiff requests that this Court, in addition to directing the Army to reinstate him to active service, also direct the Army to place him in TERA status pursuant to the National Defense Authorization Act for Fiscal Year 1993, § 4403, 10 U.S.C. § 1293, note 1 ("TERA"), which provides for the voluntary retirement of warrant officers after 20 years of active duty. TERA at § 4403(b)(1)(C) provides that: "[d]uring the active force drawdown period, the Secretary of the Army *may* . . . apply the provisions of section 1293 of such title to a warrant officer with at least 15 but less than 20 years of service by substituting 'at least 15 years' for 'at least 20 years'" (emphasis added).[5] TERA at § 4403(d) provides that the Secretary of the Army "may prescribe regulations and policies regarding the criteria for eligibility for early retirement. . . ." At the time of his separation, the Plaintiff had served over 15 years of active duty in the Active Guard/Reserve Program, and was officially notified of his eligibility for TERA status by letter on May 28, 1997. Def.'s Mot. at App. A.

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5. 10 U.S.C. § 1293 provides that the Secretary "*may*, upon the warrant officer's request, retire a warrant officer of any armed force under his jurisdiction who has at least 20 years of active service. . . ."

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For whatever reason, the Plaintiff did not seek early retirement under TERA when he was eligible and now, with the benefit of hindsight, seeks the Court to rectify this mistake. However, even if, for the sake of argument, the Army should have placed him in TERA status rather than releasing him from active duty, this Court cannot order the Army to do so because the TERA statute presents a nonjusticiable claim. As a matter of statutory construction, the word "may" usually connotes permissive discretion, as opposed to the word "shall" which connotes a mandatory task. *Andersen Consulting v. United States,* 959 F.2d 929, 932 (Fed. Cir. 1992). In Title 10, Congress specifically defined the terms "shall" and "may" in an "imperative sense" and a "permissive sense," respectively. 10 U.S.C. § 101(e)(1)-(2). "By using the permissive "may," the statute indicates that the decision to grant retirement is discretionary." *Cedillo v. United States,* 124 F.3d 1266, 1268 (Fed. Cir. 1997), *cert. denied,* 522 U.S. 1060 (1998). There can be little doubt that the wide discretion conveyed by the statute to permit the Secretary of the Army to grant TERA status to a warrant officer precludes judicial review of the merits of a decision to either grant or deny TERA status to a particular individual. *See Greek v. United States,* 44 Fed.Cl. 43, 48 (1999).

The Plaintiff, in a vain attempt to forestall the inevitable, points to 10 U.S.C. § 12686, which provides that: "[u]nder regulations to be prescribed by the Secretary concerned . . . a member of a reserve component on active duty . . . and is within two years of becoming eligible for retired pay . . . may not be involuntarily released from that duty before he becomes eligible for that pay, unless the Secretary approves his release." 10 U.S.C. § 12686. Because, according to the

Plaintiff, the Army had not promulgated any regulations that implemented TERA under 10 U.S.C. § 1293, note 1, the Army was not entitled to release him from active duty because he was already eligible for retirement pay pursuant to TERA. However, the Plaintiff's argument is wrong in part because, under 10 U.S.C. § 12686, a reservist may be involuntarily released from active duty within two years of retirement if "the Secretary approves his release." As this Court shall hold, *infra* § IV, the Secretary, through his designee, did properly approve his release from active duty. As such, no conflict exists between 10 U.S.C. § 12686 and TERA authority under 10 U.S.C. § 1293, note 1. However, even if a conflict between the two statutes did exist, the conflict still could not convert an otherwise nonjusticiable controversy into a justiciable one insofar as the application of TERA is, as stated above, entirely discretionary.

Therefore, the Plaintiff's TERA claim does not present a justiciable controversy before this Court. Accordingly, the Plaintiff's TERA claim is dismissed.

III. Standard of Review

The Plaintiff has the burden of proving that the Secretary of the Army's decision to release him from active duty and not grant him separation pay and the ABCMR's decision to deny him relief were arbitrary, capricious, in bad faith, unsupported by substantial evidence, or contrary to law, regulation, or published procedure. *Sanders v. United States,* 219 Ct.Cl. 285, 298, (1979); *Wyatt v. United States,* 23 Cl.Ct. 314, 319 (1991). Judicial review in a wrongful discharge case is usually limited to the administrative record before the

deciding official. *Wyatt,* 23 Cl.Ct. at 319. In reviewing the record, there is a strong presumption that the military officials acted correctly, lawfully, and in good faith. *Sanders,* 219 Ct.Cl. at 302.

IV. The Secretary of the Army Properly Released the Plaintiff Through His Designee.

The Secretary of the Army is authorized to release a reservist under his jurisdiction at any time. 10 U.S.C. § 12313. Pursuant to this authority and his general authority under 10 U.S.C. § 3013(g)(3) to "prescribe regulations to carry out his functions, powers, and duties under this title," the Secretary of the Army promulgated Army Reg. 600-8-24, *Officer Transfers and Discharges,* dated July 21, 1995. Under this regulation, the Secretary of the Army authorized the Director, Army Council of Review Boards, to operate the DAADB as a "tool for ensuring that only an RC [Reserve Component] officer who consistently maintains high standards of performance, efficiency, morality, and professionalism is permitted to serve on active duty." To that end, the regulation provides that "[a]pproval authority to release or retain an officer ... is the Secretary of the Army or his or her designated representative." Army Reg. 600-8-24 ¶ 2-31(a). General Order No. 10 of the Secretary of the Army, dated August 12, 1997, ¶ 8, assigned the Assistant Secretary of the Army (Manpower and Reserve Affairs) ("ASA M & RA") with general responsibility of personnel matters of the U.S. Army, including, pursuant to ¶ 81 of the Order, authority over the Department of the Army Military Review Boards and the Army Council of Review Boards. Def.'s Mot. at App. Ex. C. Under 10 U.S.C. § 3016(b)(2), his duties include

"the overall supervision of manpower and reserve component affairs of the Department of the Army." The authority over the Army Council of Review Boards, including the Army Active Duty Board (Qualitative) was delegated, in a memo dated October 27, 1997, by the ASA M & RA to DAS (Army Review Boards Agency) Karl Schneider. Def.'s Mot. at App. Ex. D. The Plaintiff has not pointed to anything in the record that shows DAS Schneider did not have the proper authority to release him from active duty or that anyone else had that authority. Thus, it is clear that DAS Schneider was the properly designated representative of the Secretary of the Army, pursuant to Army Reg. 600-8-24 ¶ 2-31(a) and the October 27, 1997 delegation memo, to oversee the functions of the DAADB and to release the Plaintiff from active duty, pursuant to Army Reg. 600-8-24 ¶ 2-31.

The Plaintiff argues, however, that under 10 U.S.C. § 3013(f), which provides that the Secretary of the Army "may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Army and to the Assistant Secretaries of the Army," does not allow for any delegation of the Secretary's authority to release a reservist from active duty to a Deputy Assistant Secretary of the Army because the statute is silent on the authority of Assistant Secretaries of the Army to delegate the Secretary's functions to Deputy Assistant Secretaries of the Army. If this Court were to accept the Plaintiff's argument as such, by implication then, none of the Secretary's functions, powers, or duties, could ever be delegated to anyone beyond the Assistant Secretaries of the Army. More to the point, the statutory authority of the Secretary under 10 U.S.C. § 3013(g)(3) to "prescribe regulations to carry out his

functions, powers, and duties under this title" is a sufficient basis for the Secretary to promulgate the pertinent section of Army Reg. 600-8-24 which provides that a "designated representative" may make the final decision to release a reservist from active duty. Army Reg. 600-8- 24 ¶ 2-31(a). Finally, in order to prevail in his argument, the Plaintiff must "overcome the strong, but rebuttable, presumption that administrators of the military, like other public officials, discharge their duties correctly, lawfully, and in good faith." *Sanders,* 219 Ct.Cl. at 302. The Plaintiff has not provided sufficient evidence that would rebut the presumption that the Assistant Secretary of the Army possessed the lawful authority to delegate separation authority to DAS Schneider and that DAS Schneider was in fact the designated representative of the Secretary of the Army to make the final decision to release the Plaintiff from active duty.

Therefore, the Court finds that the Secretary of the Army, through his designee, properly released the Plaintiff from active duty.

V. The Denial of Separation Pay Was Not Arbitrary, Capricious, or Contrary to Applicable Statutes and Regulations.

The Plaintiff maintains that he is entitled to separation pay under 10 U.S.C. § 1174(c)(1). Section 1174(c)(1) provides that a member "of an armed force other than a regular member who is discharged or released from active duty and who has completed six or more, but fewer than 20, years of active service . . . is entitled to separation pay." However, the statute further provides that "[i]f the Secretary concerned determines that the conditions under which a

[reservist] is discharged or separated do not warrant separation pay under this section, that member is not entitled to that pay." 10 U.S.C. § 1174(c)(2). The Plaintiff was released from active duty pursuant to Army Reg. 600-8-24 ¶ 2-31c-d, in which the DAADB may release a reserve component officer if he has less than 18 years of active federal service on the projected separation date and there are "demonstrated significant acts or conditions of misconduct or moral or professional dereliction." Army Reg. 600-8-24 ¶ 2-31r further provides that, with exceptions not relevant here, "[w]hile separations under this section are involuntary, there is no entitlement to separation pay." Because the Plaintiff was separated from active duty by the Army for engaging in acts of misconduct or moral or professional dereliction, and the Secretary of the Army determined, through Army Reg. 600-8-24, that reservists released from active duty for such acts are not entitled to separation pay, the ABCMR correctly denied the Plaintiff's request for separation pay.

The Plaintiff points to Department of Defense Instruction (DODI) 1332.29, *Eligibility of Regular and Reserve Personnel for Separation Pay,* dated June 20, 1991, ¶ 3.4.10, which provides that a regular service member separated from active duty is not eligible for separation pay if he is "an officer who is separated for substandard performance or acts of misconduct or moral or professional dereliction under Section 1166 or 1186 of 10 U.S.C." Def.'s Mot. at App. Ex. 5. Because this regulation does not make reserve officers separated for acts of misconduct or moral or professional dereliction ineligible for separation pay, so the Plaintiff argues, he is entitled to separation pay. However, the lack of

any provision in DODI 1332.29 denying separation pay for reserve officers separated for acts of misconduct or moral or professional dereliction is not relevant because the Secretary of the Army has, through Army Reg. 600-8-24 ¶ 2-31r, determined that reservists separated for such acts are not entitled to separation pay. The Plaintiff further argues that Army Reg. 600-8-24 is void because the regulation is inconsistent with 10 U.S.C. § 1174 since the regulation permits the DAADB to deny separation pay to a reservist, such as the Plaintiff, who receives an honorary characterization of service. This argument is completely meritless. The statute, pursuant to section 1174(c)(2), clearly gives the Secretary the discretion to establish criteria under which a reservist would not be eligible for separation pay and, under the established criteria, the Plaintiff is plainly not entitled to separation pay because he was separated for misconduct.

VI. Conclusion

The Defendant's motion to dismiss is GRANTED in part, and its motion for judgment upon the administrative record is GRANTED in part. The Plaintiff's motion for judgment upon the administrative record is DENIED. The Clerk of the Court is directed to enter judgment in favor of the Defendant and to dismiss the complaint.

s/ Edward J. Damich
EDWARD J. DAMICH
Judge

APPENDIX C — ERRATA LETTER OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED JANUARY 17, 2002

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 00-518 C

(Filed: January 17, 2002)

LYLE D. MCMULLEN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

J. Byron Holcomb, Bainbridge Island, WA, for plaintiff.

Joanne E. Johnson, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for defendant, with whom were *James M. Kinsella,* Deputy Director; *David M. Cohen,* Director; and *Stuart E. Schiffer,* Acting Assistant Attorney General. *Lieutenant Colonel Jill M. Grant* and *Captain Toby D. McCoy,* United States Army Litigation Division, Arlington, VA, of counsel.

Appendix C

ERRATA

DAMICH, Judge.

The Court makes the following corrections in its published decision, filed on November 30, 2001.

a. The following shall be substituted for footnote 4 in its entirety:

The Plaintiff cited *Dumas* in its reply brief for the proposition that this Court could review Article 15 actions for due process violations despite the fact that *Dumas*, as discussed above, clearly held that due process rights under the Fifth Amendment do not attach to Article 15 actions accepted by a service member. Furthermore, even as a factual matter, the Plaintiff sought legal advice during the investigation, *AR* at 11, and the Plaintiff signed the Record of Proceedings of the Article 15 action which informed him of his right to consult with legal counsel and initialed the portion of the Record of Proceedings which stated that "[h]aving been afforded the opportunity to consult with my counsel, my decisions are as follows. . . ." *AR* at 19.

b. page 6, lines 26-27, change "*Dumas*, 465 U.S. at 476." to "*Dumas*, 223 Ct. CI. at 476."

s/ Edward J. Damich
EDWARD J. DAMICH
Judge

APPENDIX D — MEMORANDUM OF CONSIDERATION OF THE DEPARTMENT OF THE ARMY, BOARD FOR CORRECTION OF MILITARY RECORDS DATED MAY 25, 2000

DEPARTMENT OF THE ARMY
BOARD FOR CORRECTION OF MILITARY RECORDS
1941 JEFFERSON DAVIS HIGHWAY, 2ND FLOOR
ARLINGTON VA 22202-4508

MEMORANDUM OF CONSIDERATION

IN THE CASE OF: MCMULLEN, LYLE D.
532-42-3306

BOARD DATE: 25 May 2000
DOCKET NUMBER: AR1999032292

I certify that hereinafter is recorded the record of consideration of the Army Board for Correction of Military Records in the case of the above-named individual.

Mr. Joseph A. Adriance — Analyst

The following members, a quorum, were present:

Mr. Elzey J. Arledge, Jr. — Chairperson
Mr. Ernest W. Lutz, Jr. — Member
Mr. Kenneth L. Wright — Member

The Board, established pursuant to authority contained in 10 U.S.C. 1552, convened at the call of the Chairperson on the above date. In accordance with Army Regulation 15-185, the application and the available military records

pertinent to the corrective action requested were reviewed to determine whether to authorize a formal hearing, recommend that the records be corrected without a formal hearing, or to deny the application without a formal hearing if it is determined that insufficient relevant evidence has been presented to demonstrate the existence of probable material error or injustice.

The applicant requests correction of military records as stated in the application to the Board and as restated herein.

The Board considered the following evidence:

Exhibit A - Application for correction of military records
Exhibit B - Military Personnel Records (including advisory opinion, if any)

APPLICANT REQUESTS: In effect, that he be reinstated to active duty and be provided back pay and allowances, and that he be retired for length of service if eligible. In addition, if he is not reinstated to active duty and or retired, that he be granted entitlement to and be paid separation pay based on his honorable release from active duty (REFRAD) on 1 April 1999.

APPLICANT STATES: He has provided the enclosed counsel brief, which presents arguments in his behalf in regard to his entitlement to separation pay and to his claim that nonjudicial punishment (NJP) action taken against him should be rendered null and void.

Appendix D

COUNSEL CONTENDS: In effect, that the applicant was improperly denied separation pay after being REFRAD, with an honorable characterization of service, after serving for 17 years. This denial was based on the regulatory authority used for his separation, which does not grant entitlement to separation pay under the provisions of Title 10 of the United States Code, Section 1173 (10 USC 1173). Counsel contends that the regulation does not comport with the said statute and claims there is nothing in the statute which precludes the payment of the separation pay that was denied to the applicant under the regulation. Counsel also claims that the 22 January 1998 NJP action imposed on the applicant, under the provisions of Article 15 of the UCMJ, should be declared null and void. He argues that the officer who administered the NJP action was without legal authority to do so. His basis for this contention is that the officer administering the NJP was a Reserve officer, not on active duty, and even though the applicant was attached to his command he did not have the authority to conduct the Article 15 action against an officer who was on active duty. Counsel's expanded arguments on the issues are provided in the enclosed brief.

EVIDENCE OF RECORD: The applicant's military records show:

The applicant served on active duty in an Active Guard/ Reserve (AGR) status, in the rank of chief warrant officer/ W-4 (CW4), from 11 January 1987 until his REFRAD on 1 April 1999. At the time of his REFRAD he had completed 15 years, 9 months, and 14 days of active military service and 9 years, 7 months, and 15 days of inactive service.

Appendix D

On 14 February 1997, an investigating officer was appointed to conduct an investigation of the applicant, under the provisions of Army Regulation 15-6. The investigating officer was tasked to investigate the following allegations against the applicant: misuse of a government credit card; false statements made to obtain permissive leave; false claims for pay and allowances; fraternization with an AGR sergeant; adultery with an AGR sergeant; false statements made in an application for government housing; and intimidation of a witness which constituted conduct unbecoming.

On 7 March 1997, the investigating officer provided his findings and recommendations. He found that the applicant had, in effect, misused his government credit card by using it for personal use; made a false statement to obtain permissive leave; made false claims to obtain pay and allowances over a 15 year period by, on at least four occasions, by submitting claims which resulted in his obtaining over $20,000 in fraudulent payments from the government; fraternized, by engaging in a personal social relationship, with an AGR sergeant who was a former member of his unit and command; and although not proven beyond a reasonable doubt, likely committed adultery with the AGR sergeant. The investigating officer's final recommendation was that court-martial charges be preferred against the applicant for the aforementioned findings which constituted several violations of the UCMJ.

On 22 January 1998, the applicant accepted NJP, under the provisions of Article 15 of the UCMJ, for violations of Articles 107, 134, and 92. These violations included his making a false statement that he was married and had a

dependent daughter in order to obtain government housing; wrongly endeavoring to impede an investigation by attempting to influence the testimony of a witness; and failing to obey a lawful order to refrain from contacting any witnesses in the investigation being conducted against him. His punishment for this offense was to receive a letter of reprimand. The applicant elected not to appeal the NJP action and the letter of reprimand was issued to him on the same day.

On 8 December 1998, the Director of the Full Time Support Management Directorate of the Army Reserve Personnel Command (ARPERSCOM) elected to submit the applicant's case for consideration by the Department of the Army Active Duty Board (DAADB), under the provisions of paragraph 2-31, Army Regulation 600-8-24.

On 15 January 1999, the Chief of the Officer Retirements and Separations Branch of the Army Personnel Command (PERSCOM) forwarded the applicant's case to the DAADB for their review and appropriate action.

On 8 February 1999, the DAADB convened to consider the applicant's release from active duty because of his misconduct, moral or professional dereliction of duty, and for substandard performance. The DAADB, after carefully considering the applicant's case recommended that he be REFRAD with an honorable characterization of service.

On 11 February 1999, the appropriate authority approved the findings and recommendations of the DAADB and directed that the applicant be REFRAD with an honorable

characterization of service, by reason of misconduct, moral or professional dereliction.

Accordingly, on 1 April 1999 the applicant was separated under the provisions of paragraph 2-31 of Army Regulation 600-8-24. The DD Form 214 (Certificate of Release or Discharge From Active Duty) issued to the applicant contains no authorization for separation pay in block 18 (remarks) and block 26 (separation code) shows that he was assigned a Separation Program Designator (SPD) code of LGH.

Army Regulation 600-8-24 (Officer Transfers and Discharges) prescribes the officer transfers from active duty to the Reserve Component and discharge functions for all officers on active duty for 30 days or more. Section XV (Process Involuntary REFRAD by the Department of the Army Active Duty Board) contains guidance on processing an officer for an involuntary REFRAD. Paragraph 2-31 contains the rules for processing involuntary REFRAD by the DAADB. The DAADB (qualitative) is the Army's tool for ensuring that only a Reserve Component officer who consistently maintains high standards of performance, efficiency, morality, and professionalism is permitted to serve on active duty.

The regulation allows local commanders; the commander of PERSCOM; the Chief of the Army Reserve; or the commander of ARPERCEN to recommend that a RC officer be considered by a DAADB to determine if the officer's manner of performance, degree of efficiency, or misconduct constitutes consideration for involuntary separation. An officer may be considered by the DAADB if they have

less than 18 years of active federal service on the projected separation date and there is evidence of a significant act or condition of misconduct or moral or professional dereliction.

Department of the Army Circular 635-92-1 outlines the eligibility criteria for separation pay and illustrates the various types of separation that are either eligible or ineligible for separation pay. Paragraph 2-4 (not eligible for separation pay) states, in pertinent part, that an officer being involuntarily separated for acts of misconduct or moral or professional dereliction is not authorized to receive separation pay.

Army Regulation 635-5-1 (Separation Program Designator (SPD) Codes) provides the specific authorities (regulatory or directive), reasons for separating soldiers from active duty, and the SPD codes to be entered on the DD Form 214. The SPD code of LGH was the appropriate code for the applicant based on the guidance provided in Army Regulation 635-5-1 for soldiers separating under the provisions of paragraph 2-31, Army Regulation 600-8-24 for non-retention on active duty.

Army personnel officials in concert with the Defense Finance and Accounting Service (DFAS) have tied the entitlement to separation pay, as provided for by the law, to the authority for and narrative reason for discharge. This authorization is codified in the SPD code assigned to a soldier at separation. Published DFAS guidance in regard to separation pay indicates that the SPD code of LGH, which was the code properly assigned to the applicant at separation, does not carry with it the authorization for payment of separation pay.

Appendix D

Army Regulation 27-10 (Military Justice) prescribes the policies and procedures pertaining to the administration of military justice. Chapter 3 (Nonjudicial Punishment) implements and amplifies Article 15, UCMJ, and Part V, of the Manual for Courts-Martial. This chapter prescribes requirements, policies, limitations, and procedures for commanders at all levels imposing nonjudicial punishment, members on whom this punishment is to be imposed, and other persons who may take some action with respect to the proceedings.

Paragraph 3-7 (who may impose nonjudicial punishment) states, in pertinent part, that unless authority to impose nonjudicial punishment has been limited or withheld by a superior commander, any commander is authorized to exercise the disciplinary powers conferred by Article 15. The term "commander," as used in this chapter, means a commissioned or warrant officer who, by virtue of that officer's grade and assignment, exercises primary command authority over a military organization or prescribed territorial area, that under pertinent official directives is recognized as a command.

Paragraph 3-8 (military personnel of a commander's command) states, in pertinent part, that unless such authority is limited or withheld by superior competent authority, a commander may impose punishment under Article 15 on commissioned officers, warrant officers, and other military personnel of a commander's command.

Appendix D

DISCUSSION: Considering all the evidence, allegations, and information presented by the applicant, together with the evidence of record, applicable law and regulations, it is concluded:

1. After carefully evaluating the evidence of record and the independent evidence submitted by the applicant and his counsel, the Board concluded that the relief is not warranted in this case.

2. The applicant's separation was directed by the appropriate authority, based on the findings and recommendations of a properly constituted DAADB. The reason cited by the separation authority for the applicant's separation was his misconduct and moral or professional dereliction, which does not carry with it an entitlement to separation pay. Further, the Board determined that this process was conducted in accordance with applicable law and regulations and found the reason and authority for the applicant's REFRAD were proper and equitable.

3. The Board noted the contention of the applicant and his counsel that the NJP action of 22 January 1998 should be null and void because the official administering the proceedings did not have the legal authority to impose NJP. However, the Board found no available evidence that supports this claim. The officer who administered the Article 15 action against the applicant was in fact his commander and there is no indication that his authority to impose NJP had been withheld by a higher authority.

4. In addition, the Board concluded that even if the NJP action were declared null and void, this would not serve to exonerate the applicant of the misconduct that resulted in his separation. The applicant's moral or professional dereliction was established in the findings of the Army Regulation 15-6 investigation of his conduct, which found that he violated several articles of the UCMJ. Therefore, the Board concluded that the applicant's separation for misconduct, moral or professional dereliction would remain a proper and equitable outcome even were the NJP action overturned. Therefore, the Board resolved that there was no basis for returning the applicant to active duty or to take any of the associated relief actions requested.

5. In order to justify correction of a military record the applicant must show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the record is in error or unjust. The applicant has failed to submit evidence that would satisfy the aforementioned requirement.

6. In view of the foregoing, there is no basis for granting the applicant's request.

DETERMINATION: The applicant has failed to submit sufficient relevant evidence to demonstrate the existence of probable error or injustice.

Appendix D

BOARD VOTE:

_____ _____ _____ GRANT

_____ _____ _____ GRANT FORMAL HEARING

s/ [illegible]
_____ _____ _____ DENY APPLICATION

s/ Karl P. Schneider
Karl P. Schneider
Director, Army Review Boards Agency

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED NOVEMBER 12, 2003

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

02-5054

LYLE D. MCMULLEN,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

ON MOTION

Before BRYSON, DYK, and PROST, *Circuit Judges*.

ORDER

The mandate in this case having issued before the petition for rehearing was received, the court treats the petition as a motion to recall the mandate and grant rehearing.

Upon consideration thereof,

IT IS ORDERED THAT:

The court denies the motion and the petition for rehearing.

Appendix E

FOR THE COURT

s/ Jan Horbaly
Jan Horbaly
Clerk

NOV 12 2003
Date

cc: J. Byron Holcomb, Esq.
Joanne E. Johnson, Esq.